No. 15-1591

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nancy Lund, Liesa Montag-Siegel, and Robert Voelker,
Plaintiffs-Appellees,

v.

Rowan County, North Carolina,
Defendant-Appellant.

On Appeal from the United States District Court for the
Middle District of North Carolina

SUPPLEMENTAL BRIEF FOR MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF ROWAN COUNTY, NORTH CAROLINA AND REVERSAL OF THE DISTRICT COURT JUDGMENT

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Sen. James Lankford	OK
Sen. Richard Burr	NC
Sen. Thom Tillis	NC
Sen. James E. Risch	ID
Sen. Steve Daines	MT
Rep. Walter Jones	NC-03
Rep. Virginia Foxx	NC-05
Rep. David Rouzer	NC-07
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Rep. Bob Goodlatte	VA-06

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a bipartisan group of fifteen members of Congress who believe that legislative prayer in accordance with one's own religious tradition is a vital, robust, and constitutionally protected practice grounded in this Nation's history and tradition, as the Supreme Court reaffirmed in *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014). *Amici* respectfully refer the Court to the principal brief filed by members of Congress in August 2015 ("Members Br.") for a discussion of the history of member-led legislative prayer, *see* Members Br. 5-11, and how it fits within this Court's precedent, *see id.* at 12-14, respects legislators' First Amendment rights, *see id.* at 14-25, and satisfies the *Town of Greece* plurality's objective coercion analysis, *see id.* at 26-36.

While *amici* come from diverse faith traditions, they are united as legislators in the opinion that the panel majority correctly applied *Town of Greece* to the facts of this case—and are united in their concern over

[1] In accordance with Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *amici curiae* state that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici curiae* and their counsel contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(4)(D).

the possibility that the full Court may adopt a subjective, intrusive inquiry, such as the one applied by the panel dissent. Relying on opinions about what promotes "American pluralism," Dissent 57, the dissent would parse prayer content, *see id.* at 62-63, 69-70, supervise prayer-giver selection, *see id.* at 63-66, and find coercion in innocuous statements, *see id.* at 66-68. And for a remedy, the dissent would go further, evidently requiring prayer-givers to recite a so-called "Message of Religious Welcome," or else accept judicial supervision over whether prayers are sufficiently "non-denominational" or "diverse." *Id.* at 72.

Amici submit this supplemental brief to highlight the pitfalls associated with an approach to legislative prayer that focuses on eliminating perceived "tensions," Dissent 72, rather than objectively examining constitutional "tradition," as *Town of Greece* requires, 134 S. Ct. at 1819. For example, in considering whether prayer-givers in Rowan County were drawn from sufficiently diverse backgrounds, the dissenting opinion lumped all "Christian denominations" together as "one faith." Dissent 59, 61. In parsing the content of the prayers, it characterized prayers as "sectarian" when they "closed with some variant of 'in Jesus' name,'" but described as "non-sectarian" prayers

that used a pronoun instead. *Id.* at 62. And it transformed transition statements like "Let us pray" into coercive directives, despite no evidence that anyone was forced to participate. *Id.* at 67.

Judges have many responsibilities, but *Town of Greece* makes clear that homogenizing the traditions of our Nation's legislatures to promote the judiciary's ideas of "religious peace" (Dissent 73) and "pluralism" (*id.* at 57) is not among them. A straightforward application of *Town of Greece* mandates rejecting the dissent's approach in favor of the panel majority's—which, rather than enmeshing judges in theology, respects our Nation's legislatures as centuries-old stewards of the tradition of legislative prayer. As elected officials with broad legislative experience, *amici* respectfully urge the Court to hew to its constitutional role by embracing the panel majority's approach.

ARGUMENT

I. The Panel Majority Correctly Applies *Town Of Greece* And Properly Respects Our Nation's Legislatures.

Town of Greece is rooted in respect for our Nation's longstanding traditions of legislative prayer—traditions that must inform the interpretation of the Establishment Clause. *See* 134 S. Ct. at 1818-19. Rather than inventing a new test for legislative prayer, the Supreme

Court considered whether the prayer practice "fits within the tradition long followed in Congress and the state legislatures." *Id.* at 1819. The Court recognized that courts and legislatures alike lack objective standards by which to address the insoluble theological issues raised by regulating prayer content. *See id.* at 1820-24. Thus, so long as a prayer practice does not, over time, "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion," it falls within our constitutional tradition. *Id.* at 1823.

Member-led prayer practices like Rowan County's fit squarely within this tradition and this Court's precedents, *see* Members Br. 6-14; as the panel unanimously agreed, "there exists a robust tradition of prayers delivered by legislators," Dissent 59; *see* Maj. Op. 22-25.

Town of Greece also recognizes that "government may not coerce its citizens to support or participate in any religion or its exercise." 134 S. Ct. at 1825 (plurality op.) (quotation marks omitted). A plurality of Justices described this objective analysis as fact-sensitive. *See id.* at 1825; *see also* Members Br. 20 n.6. But the plurality was still careful to distinguish "coercion" from "[o]ffense," and to evaluate coercion "against the backdrop of historical practice," 134 S. Ct. at 1825-26, thereby

avoiding unnecessary judicial interference with non-coercive legislative prayer practices.

The panel majority faithfully applied this analysis to conclude that Rowan County's prayer practice is not coercive. *See* Maj. Op. 41-54. Noting the absence of any evidence that the commissioners "restricted the prayer opportunity … to promote only Christianity," *id.* at 36, that non-participating attendees "suffered adverse consequences," *id.* at 47, or that the board "'allocate[d] benefits and burdens based on participation in the prayer,'" *id.* at 48-49 (quoting *Town of Greece*, 134 S. Ct. at 1826 (plurality op.)), the majority correctly concluded that Rowan County's "legislative prayer practice is not close to crossing th[e] constitutional line," Maj. Op. 54.

II. The Dissenting Opinion Invites Judicial Interference In Legislative Prayer.

The dissent took a different approach, candidly departing from *Town of Greece*'s careful, historically focused inquiry. The first paragraph of the dissenting opinion is a "Message of Religious Welcome." Dissent 55. According to the dissent, local boards desiring to continue this Nation's "robust tradition" of member-led legislative prayer (*id.* at 59) must either (1) recite "the Message of Religious

Welcome described above" or a similar disclaimer, *id.* at 72; (2) deliver prayers that judges deem sufficiently "non-denominational," *id.*; or (3) deliver prayers that judges deem sufficiently "diverse," *id.* Short of that, legislators must run the "risk that courts will 'act as supervisors and censors' of prayer language," *id.*, "polic[ing] the content of legislative prayer," *id.* at 55.

This judicial intrusion into legislative prayer would be a surprising departure from precedent, and—unlike the record here—raises serious First Amendment problems. The Court should reject it.

The Supreme Court has repeatedly disapproved approaches to the Religion Clauses that invite judicial interference in religious matters. It has twice done so in the specific context of legislative prayer, *see Town of Greece*, 134 S. Ct. at 1822; *Marsh v. Chambers*, 463 U.S. 783 (1983), and has applied the principle much more broadly as well, *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (recognizing ministerial exception to Title VII of the Civil Rights Act of 1964); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (disapproving "intrusive inquiries into religious belief"); *Serbian E. Orthodox Diocese v.*

Milivojevich, 426 U.S. 696, 708-09 (1976) (rejecting judicial review of internal church decisions).

It is true that the plaintiffs allege that Rowan County's prayer practice was unconstitutionally coercive, and that the *Town of Greece* plurality described coercion analysis as "'fact-sensitive.'" Dissent 57 (quoting 134 S. Ct. at 1825 (plurality op.)) (emphasis removed). But the plurality's coercion analysis does not supplant the objective, historical approach that characterizes *Town of Greece*. Indeed, the plurality explicitly *embraced* it, cautioning that the coercion analysis must be conducted "against the backdrop of historical practice," which attendees are "presumed" to be "acquainted with"—including the fact that attendees are not the "principal audience for these invocations." 134 S. Ct. at 1825 (plurality op.). The plurality also made clear that whether an attendee is "coerce[d] … to support or participate in any religion or its exercise" is an entirely different inquiry from whether the attendee feels "excluded and disrespected" by a faith-specific prayer, because "[o]ffense … does not equate to coercion." *Id.* at 1825-26 (quotation marks omitted). *Town of Greece*'s coercion analysis thus accords with our historic tradition, which "assumes that adult citizens, firm in their

own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Id.* at 1823 (majority op.).

Here, plaintiffs claim offense, but have not shown they were forced to "'support or participate in any religion or its exercise.'" *Town of Greece*, 134 S. Ct. at 1825 (plurality op.); *see* Members Br. 26-36. The panel dissent concluded that "the combination of the role of the commissioners, their instructions to the audience, their invocation of a single faith, and the local governmental setting" renders Rowan County's prayer practice unconstitutionally coercive. Dissent 66. But the only listed factor that differs from *Town of Greece* is the occupation of the prayer-givers, who are commissioners instead of clergy or volunteers. *Town of Greece* provides no support for the idea that this single factor changes the coercion outcome; even the dissent agreed that Rowan County's "prayer practice was not infirm simply because it was led by the commissioners." Dissent 59. Indeed, the dissent conceded that "[n]o single aspect or consequence of this case alone creates an Establishment Clause problem." *Id.* at 66.[2] The dissent's position was

[2] In this regard, the dissent reasoned in a circle. It began by announcing that the "crucial" fact is that legislators (not clergy)

thus that, through synergy, the "interaction among elements specific to this case"—each of which is indisputably constitutional—"rises to the level of coercion that *Town of Greece* condemned." *Id.* at 61-62.

The Second Circuit in *Town of Greece* took a similar position, before the Supreme Court took up the case. It argued that failing to promote minority faith prayers "all but ensured a Christian viewpoint," 134 S. Ct. at 1818; the dissent here similarly suggested that the Rowan County board could seek out "diverse prayer-givers," Dissent 72. The Second Circuit held that the words "let us pray" unduly coerced those who heard them, 134 S. Ct. at 1818; the dissent took the same view, *e.g.*, Dissent 67. The Second Circuit seized on the "'steady drumbeat' of Christian prayer," 134 S. Ct. at 1818; the dissent similarly highlighted the "unremitting record" of prayers from "a single faith" over "many

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delivered the prayers. Dissent 58. But after conceding the "robust tradition" of that practice, the dissent pivoted, suggesting that the real problem is the "highly sectarian" content of the prayers. *Id.* at 59, 61. Recognizing that "sectarian prayer is not by itself unconstitutional" (*id.* at 56), the dissent argued that the prayers were coercive because they began with phrases like, "Let us pray." *Id.* at 67. Finally, after acknowledging that this phrase was present in *Town of Greece* and did not result in coercion, *id.*, the dissent returned full circle: The prayers are infirm because they were administered by commissioners and not "guest ministers." *Id.* (quotation marks omitted).

years," Dissent 66. Finally, the Second Circuit claimed that it was the "'interaction of the facts present in [the] case,' rather than any single element," that rendered the Town of Greece's practice unconstitutional, 134 S. Ct. at 1818; the dissent took the same view of the "interaction among elements specific to this case," Dissent 61, conceding that "[n]o single aspect" of it violates the Constitution, *id.* at 66.

The Supreme Court reversed the Second Circuit, rejecting the invitation to "sweep away what has so long been settled" and "create new controversy." *Town of Greece*, 134 S. Ct. at 1818-19. This Court should similarly respect our constitutional tradition of member-led prayer by straightforwardly applying *Town of Greece* and rejecting calls for subjective, intrusive rules like the one applied by the panel dissent.

III. The Dissenting Opinion Exemplifies The Dangers Of Judicial Interference With Legislative Prayer.

Beyond violating precedent, the approach taken by the dissent exemplifies the pitfalls of straying from the Supreme Court's objective, historical approach to legislative prayer, inevitably entangling judges in theological line-drawing. This Court should steer clear of such a sweeping, intrusive rule.

A. The Dissent's Approach Requires Courts To Make Subjective Theological Judgments.

The Supreme Court in *Town of Greece* warned of "[t]he difficulty, indeed the futility, of sifting sectarian from nonsectarian speech." 134 S. Ct. at 1822. It therefore instructed that where, as here, there is no objective indication that prayers have been exploited to proselytize or to disparage, "the 'content of the prayer is not of concern to judges.'" *Id.* at 1821-22. This directive spares judges from facing the intractable theological problems that confronted the dissent as it struggled to avoid what it deemed "uniformly sectarian prayer." Dissent 72.

1. The dissent described nearly all of the prayers at issue as "sectarian" because they ended "with some variant of 'in Jesus' name.'" Dissent 62. But the dissent also deemed "non-sectarian" prayers that ended with "in His Holy name." *Id.* (citing JA 296 n.2). For the dissent, then, the line between sectarian and non-sectarian prayer evidently turns on the use of a pronoun—an arbitrary distinction confirming that there is hardly a task "less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than distinguishing "'sectarian' religious practices" from "ecumenical" ones. *Lee v. Weisman*, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring).

Judges are not qualified to parse terms like "Allah," "Almighty," "Father," "God," "Holy Trinity," or "Son" into denominational and non-denominational categories in a way that would satisfy all monotheists, much less "nonbelievers or polytheists." *Town of Greece*, 134 S. Ct. at 1822-23. "That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from [our legislative-prayer] tradition." *Id.* at 1823. Instead, government "must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what … [a] judge considers to be nonsectarian." *Id.* at 1822-23; *see* Members Br. 16-21.

2. The dissent also concluded, repeatedly, that Rowan County's prayers established "one and only one faith." Dissent 56; *see also id.* at 61, 66, 69, 72. It thereby disposed of centuries of religious debate by lumping together United Methodists, Independent Baptists, and Southern Baptists—the "religious affiliation[s]" of the commissioners here, *see* J.A. 275-94. This line-drawing failure illustrates the difficulty of the task more generally. Are *all* Protestants of "one faith?" Catholics too? What metric defines one "faith" as distinct from another? Notably, a recent controversy at a Christian college centered around the claim

that Christians and Muslims—"people of the book"—share the same God.[3] Under the dissent's approach, judges' answers to these questions could lead them to different coercion conclusions. This approach requires judges to act as theologians, and ultimately would require subjective judgments—hardly an acceptable stand-in for legal analysis.

B. The Dissent Unreasonably Finds Coercion In Innocuous, Inclusive Language.

Town of Greece holds that the "choice" between "remain[ing]" in "quiet acquiescence" during a prayer and "exit[ing] the room" is not an "unconstitutional imposition" for "mature adults." *Town of Greece*, 134 S. Ct. at 1827 (plurality op.). The dissent disagreed, opining that these "options" create "tensions" and may "marginalize" attendees. Dissent 71-72. Not only is this out of step with Supreme Court precedent, but the dissent's subjective analysis proves the wisdom of the Supreme Court's rejection of a hair-trigger approach to coercion.

While the dissent framed its entire analysis under the rubric of "coercion," the only supposed "directives" it identified are innocuous

[3] Manya Brachear Pashman & Marwa Eltagouri, *Wheaton College Says View of Islam, Not Hijab, Got Christian Teacher Suspended*, Chi. Tribune (Dec. 16, 2015), *available at* https://goo.gl/5cRWcz.

statements that customarily precede prayers, such as "Let us pray." Dissent 67. The dissent gave this phrase a hyper-literal meaning and claimed that it fell "squarely within the realm of soliciting, asking, requesting, or directing." *Id.* (quotation marks omitted).

Once again, the dissent seems to assign constitutional significance to pronoun choices: Presumably, the dissent would be satisfied if the prayers had instead begun, "Let *me* pray." But "[d]eciding cases on the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication." *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 675-76 (1989) (Kennedy, J.). It would also open a Pandora's box of uncertainty for our Nation's legislatures, and chill our tradition of legislative prayer. Officials would need to divine how a court would respond to phrases like, "Betty will now lead *our* prayer." Similar questions would arise from "directions" or "solicitations" to "Have a merry Christmas."

"It is irresponsible to make the Nation's legislators walk this minefield." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768-69 n.3 (1995) (plurality op.). Language like "Let us pray" fits within the constitutional tradition of member-led legislative prayer, *see*

Members Br. 30-31, and was approved in *Town of Greece*, *see* 134 S. Ct. at 1826 (plurality op.); *id.* at 1832 (Alito, J., concurring). Indeed, such language can be thought of as "*inclusive*, not coercive," *id. at* 1826 (plurality op.) (emphasis added), regardless of the occupation of the speaker, *see* Members Br. 31-32. Notably, this very language was used at the 2009 and 2013 presidential inaugurations. *See* 155 Cong. Rec. S667, S667 (Jan. 20, 2009); 159 Cong. Rec. S183, S186 (Jan. 22, 2013).

To show unconstitutional coercion, plaintiffs must prove—not that they subjectively felt "excluded," "disrespected," or otherwise offended—but that government objectively "classified citizens based on their religious views." *Town of Greece*, 134 S. Ct. at 1826 (plurality op.); *see* Members Br. 32-36. Such classification undisputedly finds no support in the record here.

CONCLUSION

The Court should adopt the panel majority's analysis, vacate the injunction, and reverse the judgment of the district court.

Dated: December 22, 2016

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Federal Rule of Appellate Procedure 29(a)(5) because it is 15 pages long and therefore no more than half the length authorized for the parties' principal briefs, *see* Dkt. 93 (Nov. 23, 2016), excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point New Century Schoolbook font.

Dated: December 22, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2016, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I further certify that on December 22, 2016, an electronic copy of the foregoing document was served electronically by the Notice of Docket Activity on counsel for all parties.

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